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Supreme Court, U.S.
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No.: _____

IN THE

Supreme Court of the United States

October Term, 1989

HERBERT PATE,

Petitioner,

-against-

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

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QUESTIONS PRESENTED

1. Whether the sentencing court in view of this Court's decision in Rodriquez v. United States, ____U.S.____, 107 S. Ct. 1351 (1987) improperly imposed consecutive terms of imprisonment on the four 18 U.S.C. Section 3147 Counts?

2. Whether the sentences imposed on the 18 U.S.C. Section 3147 Counts should be vacated because the District Court sentenced Petitioner under a misapprehension that it had to impose a mandatory minimum term and incorrectly informed Petitioner pursuant to Rule 11(c)(1), Federal Rules of Criminal Procedure, of his mandatory minimum.

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PRELIMINARY STATEMENT

This is an appeal by Petitioner, Herbert Pate, from a judgment of the United States Court of Appeals for the Second Circuit, decided July 28, 1988 by summary order, which denied Petitioner's motion pursuant to Rule 35 of the Federal Rules of Criminal Procedure to correct an illegal sentence. A further

appeal was made for a Rehearing with a suggestion for a Rehearing En Banc, but by order dated October 5, 1988, the Circuit denied the petition of Mr. Pate. A motion had been made to the United States District Court for the Eastern District of New York to correct a sentence of United States District Judge Mishler, in which the Court took the position that it was obliged to sentence Petitioner to consecutive terms of imprisonment with regard to each count Petitioner was convicted of that had occurred while he was on bail pursuant to 18 U.S.C. Section 3147.

JURISDICTION

The jurisdiction of the Court is invoked under Title 28 United States Code, Section 1251. There is no opinion of the United States Court of Appeals for the Second Circuit, inasmuch as the affirmance was by summary order.

STATUTE INVOLVED

18 U.S.C., Section 3147 Penalty for an offense committed while on release

A person convicted of an offense committed while released pursuant to this chapter shall be sentenced, in addition to the sentence prescribed for the offense to --

(1) a term of imprisonment of not less than two years and not more than ten years if the offense is a felony; or

(2) a term of imprisonment of not less than ninety days and not more than one year if the offense is a misdemeanor.

A term of imprisonment imposed pursuant to this chapter shall be consecutive to any other sentence of imprisonment.

FACTS

On September 8, 1986, Herbert Pate pleaded guilty to a six count information charging him with tax evasion and defrauding an insurance company through wire communications. Initially he was on bail on a 18 U.S.C. Section 1001 charge alleging that he made a false statement to the Parole Board regarding his financial assets and a search was made of two homes owned by Mr. Pate, one in New York and one in upstate New York,

and a firearm was found at each location. He was, thus, charged with possession of a firearm while on bail and having an unregistered weapon while on bail with regard to each location. Thus, when Mr. Pate pleaded guilty to the evasion and fraud counts he also pleaded guilty to the counts involving the firearms. He had been charged with the Section 1001 violation but that was dropped as part of the plea bargain. The counts involving the firearms arose as a result of the search of his homes. Therefore, Mr. Pate was convicted of a total of six counts, the last four of which involved the enhancement provisions of 18 U.S. C. Section 3147, and the Court, after sentencing Pate to one year on Count One, the evasion count, and one year concurrent on Count Two, the fraud count, took the position that the next four counts required it to impose at least two years on each of the four counts, in that each two year sentence would run consecutive to each other. Thus, on Count Three

Mr. Pate got two years consecutive to Counts One and Two; on Count Four he got another three years consecutive. The net result was that for the basic criminal charges, the evasion and the fraud, Pate received one year on each count to be served concurrent with each other, but because of the District Court's misapplication of 18 U.S.C. Section 3147, Pate ended up with a total of twelve years in prison. The District Court relied on the interpretation of the enhancement statute which had been rendered in an opinion of the United States Court of Appeals for the Second Circuit in United States v. Rodriquez, 794 F.2d 25 (2d Cir. 1986). Thereafter, this Court reversed the Second Circuit in that same case of Rodriquez v. United States, ___U.S.___, 107 S.Ct. 1351 (1987), which it held that a trial court or a sentencing court was not obligated to impose consecutive sentences regarding 18 U.S.C. Section 3147.

Petitioner Pate was sentenced by the Trial Court based upon an opinion which later was held by this Court to be erroneous. A motion was made to correct the sentence and the District Court denied it, The Circuit Court thereafter affirmed and denied the petition for Rehearing with the suggestion for Rehearing En Banc.

At the plea colloquy and later at the sentence the District Court stated its belief that 18 U.S.C. Section 3147 required enhanced consecutive sentences for each of the four crimes committed while on bail rather than a single enhancement under Section 3147 to run consecutive to the sentences imposed for the substantive crimes (Sentence Minutes, November 6, 1986, Pages 7-15). The District Court stated:

> "[O]n counts three, four, five and six ... there were minimum terms of two years and that all the terms of imprisonment imposed must be consecutive to any other sentence of imprisonment ...

> As I view it, that means for those four sentences, that each sentence must be consecutive to every other sentence I impose and the sentence on each of the crimes must be for not less than two years."

Following its view that 18 U.S.C. Section 3147 provided for consecutive enhanced sentences, the Court imposed the following prison terms:

> Count One - one year
> Count Two - one year to run concurrently with the term imposed in Count One.
> Count Three - two years, consecutive to the terms imposed in Counts One and Two.
> Count Four - three years, consecutive to the terms imposed in Counts One, Two and Three.
> Count Five - three years, consecutive to the terms imposed in Counts One, Two, Three and Four.
> Count Six - three years, consecutive to the terms imposed in Counts One, Two, Three, Four and Five.

Subsequently, Petitioner challenged his sentence arguing that Section 3147 did not provide for consecutive enhanced sentences. In its Memorandum of Decision and Order, the District Court dealt with this claim in rather

summary fashion -- it was denied without the benefit of either citation or analysis. The totality of the District Court's reasoning on this issue encompassed no more than a sentence:

> "[D]efendant argues that Section 3147 only requires that the Court impose one enhanced Section 3147 sentence to run consecutive to any other sentences that may be imposed for the substantive crimes . . . We find that the clear and unambiguous language of the statute contradicts defendant's argument that Section 3147 requires the Court to impose only one enhanced sentence. Thus, we find defendant's second argument is without merit."

During the oral argument on appeal, the panel recognized the necessity of resolving this important issue, one of first impression in the country. However, it apparently declined to do so for the reason that in only one count, Count Five, did the use of the enhancement in this case result in a sentence exceeding the maximum term of imprisonment otherwise provided. Indeed, during the argument, the Court specifically requested counsel

to inform it by letter of any sentences imposed on Petitioner which exceeded the maximum term otherwise provided by virtue of the enhancement contained in Section 3147. Thus, the panel believed that the issue did not warrant a resolution since, on all but Count Five, the sentence the District Court imposed was shorter than the maximum sentence could have been imposed without applying the enhancement contained in Section 3147.

This issue will raise itself time and again in all prosecutions where the defendant is convicted of at least two counts which are enhanced by Section 3147. Indeed, even though Section 3147 was amended, effective November 1, 1987, by deleting mandatory minimum terms of imprisonment (see 18 U.S.C. Section 3147 (West 1985 and Supp. 1988), the issue of whether an individual convicted of two or more counts enhanced by Section 3147 receives a single enhancement, or multiple enhancements to be consecutively served, remains, and thus

needs resolution.

The sentencing and District Court clearly was confused, and even doubted whether or not two year enhanced consecutive sentences on each of the four counts was fair. The Court said:

> "THE COURT: Before I go on to the sentencing, I don't know whether at the time of sentencing or time of the plea proceeding I advised Mr. Pate that on Counts Three, Four, Five and Six that there were minimum terms of two years and that all the terms of imprisonment imposed must be consecutive to any other sentence of imprisonment . . .
>
> MR. SHARGEL: Well, Judge Mishler, I think that the case that I read holds that it would be one two year sentence to run consecutive. But in all events, I think that Mr. O'Connell and I agree and I think that the plea agreement provides that the maximum or cap that was put on the sentence is all enveloping . . .
>
> THE COURT: As I view it, that means for those four sentences, that each sentence must be consecutive to every other sentence I impose and the sentence on each of the crimes must be for not less than two years . . .
>
> That's right. No, the cap is twenty years. I understand that. But I am

more concerned about the understanding of what the minimum sentences are and particularly the consecutive minimum sentences. You interpret it as meaning that all of the minimum sentences can be interpreted as two years. For these purposes, at least, I don't agree with you.

For these purposes, at least, I want you to consider that the parole commission and maybe ultimately the courts will decide differently and say in this case as to each sentence it is implied to serve two years consecutive.

MR. SHARGEL: May I have five minutes?

THE COURT: I frankly say I am puzzled by how it will work out.

MR. SHARGEL: We are in unchartered water . . .

MR. O'CONNEL: Your Honor, just while we are on this subject and before they begin discussing it among themselves, I would just like to point out that the Government's position in construing this provision is consistent with Your Honor's analysis.

THE COURT: Well, we could both be wrong. (Sent. Tr. of November 6, 1986 at Pages 7-14)

Thus, even the District Court recognized that Section 3147 was ambiguous because it failed to express clearly whether multiple

counts alleging a violation of Section 3147 require consecutive sentences to each other or whether it was the intent of Congress to require one enhanced sentence consecutive to the basic underlying crime charged.

POINT I

IT WAS A DENIAL OF DUE PROCESS TO DENY PETITIONER'S MOTION TO CORRECT HIS ILLEGAL SENTENCE. THE COURT WAS UNDER THE MISAPPREHENSION THAT IT HAD TO IMPOSE CONSECUTIVE SENTENCES OF ENHANCEMENT PURSUANT TO SECTION 3147.

When the sentencing court imposed the consecutive sentences on each count of the information herein it was unsure of the law but was following a decision of the United States Court of Appeals for the Second Circuit which interpreted Section 3147, United States v. Rodriquez, 794 F.2d 24 (Decided June 19, 1986 - 2d. Cir. 1986) The Court followed that decision, indicating that it would have been prevented from suspending sentence or imposing probation and that it was required to impose a two year mandatory minimum. About nine months later, however, this Court reversed the Rodriquez case in Rodriquez v. United States, ____U.S.

___, 107 S.Ct. 1351 (1987), and indicated that the Second Circuit was wrong in its interpretation of the statute. This Court held that since Section 3147 did not explicitly divest sentencing judges of their authority and since repeals by implication were not favored, that a sentencing court still had authority to suspend execution of sentences until Congress made its intent clear and manifest. Thus, the Circuit Court erred and Judge Mishler's reliance on the Circuit Court's opinion was misplaced.

While no one can criticize a District Court Judge for relying on an opinion of an appellate court in his district, still a defendant should not suffer when the opinion relied on is wrong. The situation that should exist is that the case should be treated as if the Second Circuit opinion never existed and a defendant should get the benefit of any law change in his favor. Just as Courts have recognized

lenity where ambiguity in the case of penal statutes could be reversed in favor of a defendant, Bell v. United States, 349 U.S. 981 (1955), so, too, when a law change or a clarification of the law takes place in favor of leniency toward a defendant, the defendant should get that benefit. The Second Circuit in this case did not reach the issue because on argument they were only concerned with whether or not the terms of the sentences imposed exceeded the maximum terms that could have been imposed on the two substantive counts, But that begs the issue, since the District Court did not impose maximum terms on the substantive counts. It was clearly the Court's intention not to saddle the Petitioner with the greatest sentence possible.

After this Court's decision in Rodriquez, other Courts have further

expanded the sentencing court's authority under the enhancement section. For example, in United States v. Mudd, 817 F.2d 840 (D.C. Cir. 1987), it was held that probation was an available option for a District Court sentencing under the enhancement statute.

It is argued that where a sentence has been premised upon a major misunderstanding by the sentencing judge as to the legal bounds of his authority, such a sentence is illegal. United States v. DiRusso, 535 F.2d 673, 674 (1st Cir. 1976) Sentences based upon erroneous material and assumptions violate due process. United States v. Darby, 744 F.2d 1508, 1532 (11th Cir. 1984), cert. denied sub nom Calise v. United States, 471 U.S. 1100 (1985) See also United States v. Robin, 545 F.2d 775, 779 (2d Cir. 1976). Thus, in cases such as the one at bar, where "the District Court may have relied on misinformation ...

the sentence should be vacated." United States v. Stewart, 779 F.2d 538, 541 (9th Cir. 1985).

In United States v. Lewis, 392 F.2d 440 (4th Cir. 1968), the District Court sentenced a defendant under the mistaken impression that 17 U.S.C. Section 4208(a)(2) required the imposition of the maximum term which could lawfully be applied. In vacating that sentence, the Fourth Circuit states:

> "A defendant is entitled to the unfettered and unset deliberation of the Judge . . . Our decision does not obtrude on the District Judge's discretion; to the contrary, it restores it. The result permits the broad judgment typically vested in sentencing judges. Moreover, as one court has said 'Broad as his discretion may be, a sentencing judge must always conform with the law governing the sentencing function.' Coleman v. United States, 123 U.S.App.D.C. 103, 357 F.2d 563, 570 (1965)."

See Robinson v. United States, 313 F.2d 817, 821 (7th Cir. 1963).

Similarly, numerous sentences have been vacated where the sentencing court relied on a misapprehension of:

(1) Parole Commission rules, see, e.g. United States v. Ruster, 712 F.2d 409 (9th Cir. 1983) (court misunderstood defendant's eligibility for parole by 12 months); United States v. DeMier, 520 F.Supp. 1160 (W.D. Mo. 1981), aff'd. 571 F.2d 1200 (9th Cir. 1982) (court misunderstood defendant's non-eligibility for parole;

(2) the facts stated in a pre-sentence report, see, e.g., United States v. Williams, 668 F.2d 1064 (9th Cir. 1972); United States v. Robin, supra, 545 F.2d 775 (2d Cir. 1976); or

(3) the possibility of parole, see, e.g. United States v. Stewart, 779 F.2d 538 (9th Cir. 1985) (court misunderstood the unavailability of parole for a lifetime sentence under 21 U.S.C. Section 848(a)(1) due to government's erroneous advice).

Thus, it follows that, where as here, the District Court pronounced sentence under the misapprehension that it had to impose a two year mir um enhanced term, the illegal sentences should be vacated.

The sentences imposed under 18 U.S.C. Section 3147 must also be vacated because as a result of this misunderstanding, Herbert Pate was not properly informed of "the mandatory minimum penalty provided by law, if any ..." Rule 11(c)(1), Federal Rules of Criminal Procedure with regard to federal defendants, "Rule 11's concern about sentencing minimums refers only to . . . the lowest sentence the judge is permitted to impose." Hunter v. Fogg, 616 F.2d 55, (2d Cir. 1980), and, as such, requires "informing a defendant of a mandatory minimum sentence." Hill v. Lockhart, 731 F.2d 568, 571 (8th Cir.1984), aff'd, 106 S.Ct. 366 (1985); Hick v. Oliver, 523 F.Supp. 64, 67-68 (D.Kan. 1981). Thus,

the rule embodies the notion that since this information is of "extreme importance to the defendant", Horsley v. United States, 583 F.2d 670, 675 (3rd Cir. 1978), the:

> "defendant must be made aware of the outer limits of punishment. At the very least, this means that he must be apprised of the period of required incarceration. Except for capital punishment, no other consequence can be as significant to an accused as the period of possible confinement."

Quoting United States v. Berry, 412 F.2d 189, 192 (3rd Cir. 1969).

Here, since Herbert Pate was misinformed about the lowest sentence the court below was permitted to impose under Section 3147, those sentences should be vacated.

As we mentioned before, the sentencing court expressed hesitancy in imposing the consecutive enhanced sentences.

> "THE COURT: Before I go on to the sentencing, I don't know whether at the time of sentencing or time of the plea proceeding I advised

Mr. Pate that on counts Three, Four, Fixe and Six that there were minimum terms of two years and that all the terms of imprisonment imposed must be consecutive to any other sentence of imprisonment . . .

MR. SHARGEL: Well, Judge Mishler, I think that the case that I read holds that it would be one two year sentence to run consecutive. But in all events, I think that Mr. O'Connell and I agree and I think that the plea agreement provides that the maximum or cap that was put on the sentence is all enveloping . . .

THE COURT: As I view it, that means for those four sentences, that each sentence must be consecutive to every other sentence I impose and the sentence on each of the crimes must be for not less than two years . . .

That's right. No the cap is twenty years. I understand that. But I am more concerned about the understanding of what the minimum sentences are and particularly the consecutive minimum sentences. You interpret it as meaning that all of the minimum sentences can be interpreted as two years. For these purposes, at least, I don't agree with you.

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> maybe ultimately the courts will decide differently and say in this case as to each sentence, it is implied to serve two years consecutively.
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> MR. SHARGEL: We are in unchartered water . . .
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> MR. O'CONNELL: Your Honor, just while we are on this subject and before they begin discussing it among themselves, I would just like to point out that the Government's position in construing this provision is consistent with Your Honor's analysis.
>
> THE COURT: Well, we could both be wrong.

(Sent. Tr. of 11/6/86 at Pages 7-14).

The lower court recognized that Section 3147 is ambiguous to the extent it fails to express whether multiple counts alleging Section 3147 are to run consecutive to each other, or are to result in one enhanced sentence which is to run "consecutive to any other sentence of imprisonment." 18 U.S.C. Section 3147. As will be shown below,

the language of the statute, its legislative history, and the rule of lenity dictate that Section 3147 provides for a single enhancement to run consecutively to those sentences imposed for other offenses.

The language at issue herein provides:

> A term of imprisonment imposed under this section shall be consecutive to any other sentence of imprisonment.

18 U.S.C. Section 3147 (emphasis supplied). On its face, the language, "A term of imprisonment imposed under this section shall be consecutive to ... any other sentence[s]", id., presumes other sentences are being imposed under other sections. Indeed, the language clearly states that "[a] term" shall be consecutive to "any other sentence," and not that "[a] term" shall be consecutive to any other term. Had Congress intended to provide for consecutive Section 3147 terms it easily could have done so. Thus, Congress could have provided that:

> A term of imprisonment imposed under this section shall be consecutive to other terms imposed under this section and any other sentence of imprisonment.

The legislative history also supports Petitioner's conclusion. The reports of the Senate and the House Judiciary Committees make it clear that a single enhancement under Section 3147 was intended:

> Section 3147 is designed to deter those who would pose a risk to community safety by committing another offense when released under the provisions of this title and to punish those who indeed are convicted of another offense . . . Accordingly, this section prescribes a penalty in addition to any sentence ordered for the offense for which the defendant was on release. This additional penalty is a term of imprisonment of at least two years and not more than ten if the offense committed while on release is a felony. If the offense committed while on release is a misdemeanor, this additional penalty is at least 90 days and not more than one year. S. Rep. No. 147 at 61. Accord, H. Rep. No. 1121, 98th Cong., 2d Sess. 30-31 (1984); S. Rep. No. 98 225, 98th Cong., 1st Sess. 34 (1983), reprinted in 4 U.S. Code Cong. & Ad. News 3184 (1984).

United States v. Rodriquez, 794 F.2d 24-27 (2d. Cir. 1986), rev'd, ____U.S.____, 107 S.Ct. 1391 (1987) (Emphasis supplied)

Similarly, the Senate, in examining the budgetary impact of Section 3147, stated:

> If an individual is convicted of committing an offense while on release, the bill requires that the individual be imprisoned for an additional period of time, the length of which varies with the seriousness of the offense. S. Rep. No. 147 at 65, 66-67. See also H. Rep. No. 1121, 98th Cong., 2d Sess., 33, 35 (1984); S. Rep. No. 225, 98th Cong. ,1st Sess., 417 (1983), reprinted in 4 U.S. Code Cong. & Ad. News 3182 (1984); S. Rep. No. 317, 97th Cong., 2d Sess. 58, 70 (1982).

Moreover, it is noteworthy that Section 3147 has been applied in a manner identical to that Petitioner suggests. In United States v. Mesa, 641 F.Supp. 796 (S.D. Fla. 1986), the defendant was convicted under a multi-count indictment of committing violations of 21 U.S.C. Sections 848(a)(1) and 846 while released on bail prior to his sentencing on a guilty plea. While the court sentenced the defendant to two five-year consecutive sentences on the narcotics counts, it imposed a single

enhancement pursuant to Section 3147.

We also point out that in a recent decision the District Court in Maine agreed with Petitioner's interpretation of the law regarding sentence enhancement. In United States v. Deneuve, 708 F.Supp. 425 (D.Me. 1989), a case decided in March, 1989, Chief District Judge Cyr analyzed Section 3147 and decided that the legislative history compelled two pertinent conclusions concerning that Section. First, he held that the enhancement statute required additional prison time to the term of imprisonment imposed concerning the offense for which the defendant was released. Secondly, the Court decided that an enhanced sentence under Section 3147 is not required to be consecutive to any other sentence of imprisonment except for the offense for which the defendant was on release. Thus, the Court clearly concluded that multiple terms of imprisonment or sentences with regard to the

offense committed while the defendant was on release could be concurrent with each other, a position taken by Petitioner in the Court below and advanced on this proceeding. It seems unfair for the Petitioner to be saddled with all of the extra time regarding the various enhanced sentences imposed upon him. When one considers the fact that if he were to come before District Judge Mishler now to be sentenced there would probably be no doubt in Judge Mishler's mind regarding the interpretation of the enhancement statute, and he would have received much less of a jail sentence.

CONCLUSION

THE PETITION FOR CERTIORARI SHOULD BE GRANTED.

Respectfully submitted,

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